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Caisse populaire Desjardins de Val-Brillant *v.* Blouin, [2003] 1 S.C.R. 666, 2003 SCC 31

**Caisse populaire Desjardins de Val-Brillant** *Appellant*

*v.*

**Métivier & Associés Inc.** *Respondent*

**Indexed as: Caisse populaire Desjardins de Val-Brillant *v.* Blouin**

**Neutral citation: 2003 SCC 31.**

File No.: 28483.

2002: November 6; 2003: June 5.

Present: Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for quebec

*Priorities and hypothecs — Movable hypothec with delivery — Movable hypothec on claims — Validity of movable hypothec with delivery on claim not represented by negotiable instrument — Whether provisions of federal Income Tax Act affect validity of hypothec — Whether words "property or title" used in arts. 2702 and 2703 C.C.Q. are sufficiently broad to include claims not represented by negotiable instrument — Whether there may, in case of such claim, be sufficient holding by creditor to grant and publish hypothec — Civil Code of Québec, S.Q. 1991, c. 64, arts. 1641, 2702, 2703, 2710 —*

*Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 248.*

A couple of annuitants signed a statement establishing the terms of the standard RRSP offered by the Caisses populaires Desjardins. According to the statement, the plan complied with the *Income Tax Act* ("ITA") and contributions would be held by Desjardins Trust on behalf of the annuitants until the plan matured. The contributions were to be deposited in a retirement savings account at the Caisse. The Caisse issued four deposit certificates in the name of Desjardins Trust which could not be withdrawn before maturity and were non-negotiable and non-transferrable. The certificates stated that the deposits could not be given as security other than to the Caisse. Before maturity, the annuitants borrowed from the Caisse, which, by way of security, had them sign a document entitled "Movable hypothec on moneys accumulated in a retirement savings plan". The Caisse held the deposit certificates. The hypothecs were accepted by Desjardins Trust. The annuitants then made an assignment in bankruptcy. The Caisse completed the RRSP withdrawal forms. After remitting the amount of the deposits to the Caisse, to the value of the balance of the loans after tax was withheld, Desjardins Trust issued the tax statements in respect of the use of the RRSPs as security and those in respect of the extinction of the security. The trustee rejected the Caisse's claim as a secured creditor. The Superior Court ruled in favour of the Caisse, but the Court of Appeal restored the trustee's decision.

*Held* (Binnie, LeBel and Deschamps JJ. dissenting): The appeal should be allowed.

(1) *Effects of the ITA on the validity of the hypothec*

While the RRSP in which the annuitants invested cannot be characterized as a trust in the civil law sense, because the annuitants were still the owners (or creditors) of the funds invested, s. 248 ITA provides, for Quebec, that an arrangement may be deemed to be a trust if it meets certain requirements. The tax authorities characterized the RRSP as a trust, and there is nothing in the evidence that would allow that characterization to be questioned. The ITA does not prohibit the use of this RRSP as security. Determination of the validity of the hypothec, however, must be based on the civil law.

(2) *Validity of the hypothec*

*Per* Gonthier, Iacobucci, Bastarache and Arbour JJ.: The movable hypothec with delivery on a claim not represented by a negotiable instrument at issue here is valid.

The words "property or title" used in arts. 2702 and 2703 C.C.Q. are sufficiently broad to

include claims not represented by a negotiable instrument that are part of the hypothecary debtor's patrimony. This conclusion is consistent with the wording of arts. 2708, 2709 and 2710. The effect of an interpretation that would limit the expression "title" to negotiable instruments and the expression "property" to corporeal property would be to prohibit individuals from creating certain hypothecs for which the Code expressly provides.

The real question is whether there may, in the case of a claim not represented by a negotiable instrument, be sufficient holding by a creditor to grant and publish the hypothec. A movable hypothec with delivery on a non-negotiable claim is validly granted and published where (i) the debtor has transferred effective control of the claim to the creditor by giving the creditor the right to collect directly in the event of default, without further authorization by the debtor; (ii) where the claim is evidenced by a non-negotiable title which it is possible to hand over, such title has been handed over to the creditor; and (iii) the necessary steps have been taken so that the hypothec may be set up against the debtor of the claim in accordance with art. 1641 C.C.Q.

In the case of a claim not represented by a negotiable instrument, mere physical delivery of the non-negotiable instrument that attests the claim is not sufficient for a hypothecary creditor to genuinely hold the title within the meaning of art. 2703, because it does not convey effective control of the claim represented by the title. Physical delivery of a non-negotiable instrument has no legal effect between the parties, in the sense that it does not permit the hypothecary creditor himself or herself to exercise the rights provided by the title, and to exercise rights in the claim in the event of default. It therefore cannot, by itself, constitute the "remittance" required by art. 2702. It is the procedure set out in art. 2710 C.C.Q., which requires the setting up of a hypothec on a claim against the debtor of the claim in the same way as an assignment of claim, that enables the hypothecary creditor to obtain effective control of the hypothecary claim, by making it possible for the creditor's right to be set up against the debtor of the claim. The requirements that must be met in order for it to be set up against the debtor of the claim are stated in art. 1641, which does not require that complex formalities be followed: the debtor of the claim need only acquiesce in the hypothec, or receive a copy or a pertinent extract of the deed or "any other evidence of the assignment which may be set up against the assignor". When one of those requirements has been met, the pledge of the claim may be set up against the debtor. Article 1641, para. 1 does not necessarily require a writing, although one may be desirable in practice. An interpretation of the provisions of the *Civil Code of Québec* that makes it possible to create a pledge on a claim not represented by a negotiable instrument reflects the general development of the law of security interests in claims of that nature, as well as providing Quebecers with a form of access to credit that is generally available elsewhere in the world, and fostering a degree of uniformity in this area, one that is crucial to the conduct of numerous business activities, while remaining faithful to the spirit of the Code and the civil law origins of the concept of pledge.

In this case, in addition to handing over the certificates of deposit to the Caisse, the debtors agreed that the Caisse had sole authority to collect the claim from Desjardins Trust, and that the Caisse was irrevocably authorized to do so in the event of default. That contract was brought to the attention of Desjardins Trust's representatives, who agreed to it. The requirements set out in arts. 2702 and 2703 C.C.Q. were met, and the Caisse held a valid movable hypothec on those claims, a hypothec that could

be set up against the trustee.

*Per* Binnie, LeBel and Deschamps JJ. (dissenting): In order for hypothec with delivery to be included coherently in the concept of pledge, a hypothec with delivery on a title attesting a claim must both comply with the general rules of pledge and be compatible with the rules that apply to a hypothec on claims. Pledge differs from other hypothecs in that it is granted by simply handing over the property charged to the creditor (art. 2702 C.C.Q.). This simple method of granting security provides the creditor with all of the powers associated with a hypothec without any further formality or publication (art. 2703 C.C.Q.). No writing is necessary. Since it is control of the property by the creditor that characterizes a pledge, the only property that may be the object of a pledge is property which can be controlled by the creditor by simply handing it over. The word "title" in art. 2702 C.C.Q. must therefore be confined within the boundaries of the concept in respect of which it is used. In order to be the object of a pledge, the title must be one that complies with the characteristics of that kind of security. With respect to the general rules governing hypothecs on claims, art. 2710 C.C.Q. provides that the holder of the hypothec may not set up his or her right against the debtor of the hypothecated claim as long as it may not be set up in the same way as an assignment of claim. Article 1641 C.C.Q., which deals with assignments of claims, cannot be harmoniously incorporated into the concept of a hypothec with delivery. The terms for setting the claim up against the debtor set out in that article, which presuppose a writing, are foreign to the simplicity that is inherent in granting a pledge. An interpretation that would make it possible to connect the acquiescence of the debtor of the claim — the first method by which a claim may be set up against the debtor under art. 1641 C.C.Q. — to the assignment rather than to the deed of assignment cannot be adopted. A pledge, which is granted simply by handing over the property, cannot depend on the will of the debtor of the claim that is pledged in order for it to be possible to set it up against him or her. The general rule is that the debtor's patrimony is subject to the general pledge of the creditors. In order to preserve the order of distribution and balance among the creditors, the pledgee's rights must be clearly circumscribed, once all of the requirements for granting and publishing the pledge have been met. The rule set out in art. 1641 C.C.Q. for setting the claim up against the debtor is therefore limited to a hypothec without delivery, and applies in full to security of that nature.

Under art. 1647 C.C.Q., all of the characteristics of a pledge can be reconciled with the provisions concerning assignments of claims, to which art. 2710 C.C.Q. refers. In the case of a pledge, it must be possible to apply art. 2710 without a writing being necessary. Under art. 1647, no formality other than delivery need be performed in order to be able to set up the assignment against the debtor of the claim. The mechanism of art. 1647 C.C.Q., established by reference (art. 2710 C.C.Q.), is the same as the one provided in the section on movable hypothec with delivery (arts. 2702 C.C.Q. *et seq.*). In both cases, handing over or delivery is sufficient to give the creditor complete control of the property. In the case of a pledge, the right to collect the capital, interest and income must be capable of being exercised solely by virtue of holding the instrument, pursuant to art. 2743.

In short, the pledge of a claim can be granted only by handing over a negotiable instrument. An instrument of that nature is the only thing that allows for the rights inherent in the security to be granted and published, that makes it possible for it to be set up against the debtor, and that allows for the

exercise of the rights inherent in the security simply by handing over the instrument. When the instrument is not negotiable, the mere fact that it is held by a third person does not tell the debtor of the hypothecated claim what right would enable the pledgee to claim payment from him or her. By virtue of the very nature of the non-negotiable instrument of claim, the rights set out in it are the rights that the grantor may exercise against the debtor of the hypothecated claim. The fact that, in those circumstances, the pledgee would be unable to exercise his or her rights clearly shows that the instrument must necessarily incorporate the claim.

The rule set out in art. 2683 C.C.Q. expresses a clear legislative policy choice. Neither the comments made in the literature prior to the reform nor the provisions ultimately enacted seem to support the assertion that the scope of movable hypothecs with delivery should be broadened.

Here, the Caisse does not really have control of the security interest simply by holding the deposit certificates. The certificates set out the rights of Desjardins Trust and of the annuitants, but the Caisse does not, merely by holding them, acquire any right that would allow it to collect the capital at maturity without performing any formality. The hypothec is therefore not valid.

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By Gonthier J.

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By Deschamps J. (dissenting)

*Whaling (Bankrupt), Re* (1998), 117 O.A.C. 51; *Cie Trust Royal v. Caisse populaire Laurier*, [1989] R.J.Q. 550; *Gallucci (Syndic de)*, J.E. 93-617; *Poulin v. Serge Morency et Associés Inc.*, [1999] 3 S.C.R. 351; *Perron-Malenfant v. Malenfant (Trustee of)*, [1999] 3 S.C.R. 375.

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*Personal Property Security Act*, R.S.O. 1990, c. P.10, ss. 1, 2, 22, 23.

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APPEAL from a judgment of the Quebec Court of Appeal, [2001] R.J.Q. 321, 29 C.C.P.B. 1, [2001] Q.J. No. 61 (QL), setting aside a decision of the Superior Court, [1999] Q.J. No. 907 (QL). Appeal allowed, Binnie, LeBel and Deschamps JJ. dissenting.

*P. Michel Bouchard*, *Christian Trépanier* and *Daniel Dionne*, for the appellant.

*Jean-Patrick Bédard*, *Cainnech Luissiaà-Berdou* and *Marc-André Gravel*, for the respondent.

English version of the judgment of Gonthier, Iacobucci, Bastarache and Arbour JJ. delivered by

1 GONTHIER J. — I have had the privilege of reading the reasons of my colleague Deschamps J. Although I agree with her conclusion that the provisions of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("ITA"), do not affect the validity of the hypothec in question, I cannot concur in her interpretation of the provisions of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."), concerning movable hypothecs with delivery. I am of the view that the words "property or title" used in arts. 2702 and 2703 are sufficiently broad to include claims not represented by a negotiable instrument. The real question that arises in this case is whether there may, in the case of such a claim, be sufficient holding by a creditor to grant and publish the hypothec. As a general rule, holding by a creditor is sufficient, for the purposes of the pledge, when it enables the creditor to exercise effective control of the hypothecated property. When a claim is not represented by a negotiable instrument, mere physical handing over of the instrument that represents it will not be sufficient to give the creditor effective control of the claim.

On the other hand, when the hypothecary debtor gives its creditor the right to collect the claim directly in the event of default, without further authorization by the hypothecary debtor, and that consent may be set up against the debtor of the claim under art. 2710, the creditor then has effective control of the claim and a valid pledge that may be set up against third persons has been created. In this case, in addition to handing over the certificates of deposit to the Caisse populaire de Val-Brillant ("Caisse"), the debtors agreed that the Caisse had sole authority to collect the claim from Desjardins Trust, and that the Caisse was irrevocably authorized to do so in the event of default. That contract was brought to the attention of Desjardins Trust's representatives, who agreed to it. The requirements set out in arts. 2702 and 2703 were met, and the Caisse held a valid movable hypothec on those claims, a hypothec that could be set up against the trustee.

(1) *The Applicable Law*

2 A movable hypothec with delivery, which is commonly called a "pledge" (see art. 2665, para. 2 C.C.Q.), enables a creditor and a debtor to grant a hypothec on a property without the hypothec having to be registered in the registry in order for it to be set up against third persons. The hypothec is granted by handing over the property to the creditor, and the holding of the property by the creditor is sufficient to publish the hypothec. Articles 2702 and 2703 C.C.Q., which describe this mechanism, read as follows:

> **2702.** A movable hypothec with delivery is granted by delivery of the property or title to the creditor or, if the property is already in his hands, by his continuing to hold it, with the grantor's consent, to secure his claim.

> **2703.** A movable hypothec with delivery is published by the creditor's holding the property or title, and remains so only as long as he continues to hold it.

My colleague Deschamps J. is of the opinion that the word "title", as it is used in these two articles, can refer only to a negotiable instrument, so that only claims represented by such an instrument may be the object of a movable hypothec with delivery. With respect, I cannot agree with that interpretation of these articles, which I find to be unduly restrictive. In my opinion, the words "property" and "title", which are used side by side by the legislature, must be interpreted having regard to the general meaning of those words in civil law, and with a view to the consistency of the interpretation that is adopted with the other provisions of the Code, as well as with the policy objectives underlying the reform of the law of real security.

3 The general meaning of the word "property" includes both corporeal property and

incorporeal property, which itself includes personal rights that may form part of an individual's patrimony, such as claims. For example, the *Dictionnaire de droit privé* states that, in this general sense, the word "*bien*" (property) is synonymous with "*droit patrimonial*" (patrimonial right), which in turn is defined as:

> [TRANSLATION] A right to which a monetary value can be assigned which is part of an individual's patrimony. E.g. a vendor's claim, ownership.
>
> (P.-A. Crépeau, ed., *Dictionnaire de droit privé et Lexiques bilingues* (2nd ed. 1991), at p. 209)

As well, the *Dictionnaire de droit québécois et canadien* defines a *bien* as [TRANSLATION] "any material thing, any right that is part of an individual's patrimony"; this obviously includes the category of "incorporeal property", "*biens incorporels*", which is defined as follows:

> [TRANSLATION] Property which has no material existence but represents a monetary value. E.g. Trade name, claim.
>
> (H. Reid, *Dictionnaire de droit québécois et canadien avec table des abréviations et lexique anglais-français* (2nd ed. 2001), at p. 63)

4 This general meaning of the word "property" is the one most often intended by the legislature in the book on prior claims and hypothecs: for example, we might think of art. 2644 C.C.Q., which provides that "[t]he property of a debtor is charged with the performance of his obligations and is the common pledge of his creditors", or art. 2660 C.C.Q., which defines a hypothec as "a real right on a movable or immovable property made liable for the performance of an obligation". Because it is undeniably true that, first, claims that are part of an individual's patrimony form part of the common pledge of his or her creditors, and second, that the Code provides that claims may be the object of hypothecs, those two articles demonstrate that when the word "property" is used it generally includes claims. There are a host of possible examples of this use of the word "property", but we will mention only art. 2666 C.C.Q., which deals directly with the object of a hypothec and provides that "[a] hypothec is a charge on one or several specific corporeal or incorporeal properties, or on all the properties included in a universality" (emphasis added).

5 Accordingly, the word "property" which is used in arts. 2702 and 2703 *prima facie* includes all claims that are part of the hypothecary debtor's patrimony. Articles 2702 and 2703 must therefore, first, be interpreted having regard to the intention thus expressed by the legislature, to include all claims in the potential objects of a movable hypothec with delivery. Second, in these articles, the legislature chose to require that a "title" be handed over and held in order to grant and publish the pledge in certain circumstances. According to the *Dictionnaire de droit privé*, *supra*, at pp. 17 and 562, the word "*titre*" (title), in its legal sense, is synonymous with "*acte instrumentaire*" (instrument), which expression refers to a [TRANSLATION] "[w]riting prepared to record a juridical act or a juridical fact". The use of that expression reflects the fact that a personal patrimonial right is generally recorded in a title and that, in that case, the creation of a pledge of the right in question will require that the title be handed over and held. However, the use of the word "title" does not, *prima facie*, imply a distinction between negotiable and non-negotiable instruments; the definition of the expression is sufficiently broad to include both. Given this situation, can we conclude that when the legislature used that expression, it intended to limit pledges of claims to those claims that are represented by a negotiable instrument? I do not believe so, having regard not only to the legislature's *prima facie* intention to permit any type of claim to be pledged, but also to the wording of the other provisions that deal with pledge.

6 This conclusion is consistent with the wording of art. 2710, which deals with movable hypothecs on claims:

> A movable hypothec on a claim held by the grantor against a third person or on a universality of claims may be granted with or without delivery. [Emphasis added.]

That article makes no distinction between claims represented by a negotiable instrument and claims not so represented, and this indicates that any "claim" may be the object of a movable hypothec "with delivery".

7 The interpretation proposed above is also based on the wording of arts. 2708 and 2709, which deal more specifically with movable hypothecs with delivery:

> **2708.** A movable hypothec on property represented by a bill of lading or other negotiable instrument or on claims may be set up against the creditors of the grantor from the time the creditor gives value, provided the title is remitted to him within ten days from that time.

> **2709.** Where the title is negotiable by endorsement and delivery, or delivery alone, its remittance to the creditor takes place by endorsement and delivery, or by delivery alone.

Article 2708 refers separately to movable hypothecs "on property represented by a bill of lading or other negotiable instrument" and "on claims". This implies that there are movable hypothecs with delivery on claims that are not represented by a negotiable instrument. As well, the use of the word "where" at the beginning of art. 2709 indicates that the procedure provided by that article is not exclusive, and that the legislature was providing that a pledge could be granted on a claim not represented by the negotiable instruments referred to in the article.

8 The effect of taking the opposite approach, which would limit the expression "title" to negotiable instruments and the expression "property" to corporeal property, would be to prohibit individuals from creating certain hypothecs for which the Code expressly provides: hypothecs on a share in a general partnership (art. 2211) and hypothecs on rights under a contract of life insurance (arts. 2461 and 2462). Given that a natural person who is not operating an enterprise may not grant a movable hypothec without delivery (art. 2683), such a person would be unable to use that technique. As well, because the rights in question are not normally represented by negotiable instruments, it would also not be possible for them to be the object of a pledge. Given the nature of these rights, which are most often held by individuals, it would seem unlikely that the legislature would have intended to limit the ability to hypothecate them in such a way: see *Perron-Malenfant v. Malenfant (Trustee of)*, [1999] 3 S.C.R. 375, at para. 51. On this point, it is worth noting that the *Commentaires du ministre de la Justice* (1993), vol. II, at p. 1546, concerning art. 2461, para. 2, indicate that this article applies to situations that were formerly covered by [TRANSLATION] "[t]he concept of pledge under previous law". This suggests that the hypothec contemplated by this article is a movable hypothec with delivery.

9 However, the conclusion that the use of the expressions "property" and "title" in arts. 2702 and 2703 C.C.Q. is not a *prima facie* bar to the possibility of a pledge of a claim not represented by a negotiable instrument cannot, in and of itself, resolve the issue of the validity of the pledge in this case. Those articles require that the property or title be handed over to the creditor in order for the hypothec to be granted, and that the property or title be held by the creditor in order for it to be published. Those two requirements represent two sides of the same coin, in the sense that in order for there to have been effective handing over, it must result in the creditor holding the property or title. The real question is therefore whether that requirement of handing over may be met where the object of the hypothec is a claim not represented by a negotiable instrument, and in what circumstances that would be so. In other words, can there be "holding" of such a claim by the creditor in such a way that a movable hypothec with delivery is granted and published?

10 To answer that question, we must first determine the meaning of the expression "holding" (*détention*) which is used in art. 2703. "Holding" as necessary for publication of a pledge, as it has been defined by the courts, relies on the concept of "control" or "effective control" (*maîtrise effective*) of the hypothecated property by the creditor. For example, the *Dictionnaire de droit privé*, *supra*, at p. 173, defines "*détention*" as [TRANSLATION] "effective control of a thing". In *Grobstein v. A. Hollander and Son Ltd.*, [1963] Que. Q.B. 440, Bissonnette J. said, at p. 442:

> [TRANSLATION] [O]nce the creditor holds a clearly identified thing as a pledge, the creditor has "control", exclusive authority, over that thing, and the creditor's holding of the thing is neither casual nor equivocal and the creditor may dispose of it irrespective of anyone else's claims to it and, in addition, the law imposes a duty to retain and conserve the thing on the creditor, the creditor's possession is effective to secure his or her right in the pledge. [Emphasis added.]

That definition becomes clearer when we consider the objectives of a pledge. Unlike a movable hypothec without delivery, a pledge is published, that is, it may be set up against third persons, by the creditor's holding. This then means that the creditor obtains effective and exclusive control of the property in question, so that third persons are able to determine that there is a pledge, or have a means of informing themselves.

11 On the one hand, in the case of corporeal property, physically handing over the property to the creditor is sufficient both to grant the pledge within the meaning of art. 2702 and to publish it within the meaning of art. 2703, because there is then physical holding, control, by the creditor. The pledge will continue to be public for so long as the holding of it is exercised in accordance with the requirements of the Code and the case law. For instance, art. 2704 provides that holding is continuous even if its exercise is prevented by the act of a third person without the consent of the creditor or is temporarily interrupted by the handing over of the property or title to the grantor or to a third person for evaluation, repair, transformation or improvement. The intention of the legislature was thus to codify the approach adopted in *Hollander*, *supra*: see the *Commentaires du ministre de la Justice*, *supra*, at p. 1692, art. 2704.

12 On the other hand, whether or not a pledge of a claim is represented by a negotiable instrument, it is subject to the general requirements imposed on movable hypothecs on claims by art. 2710, para. 2, which provides:

> [T]he creditor may not set up his hypothec against the debtors of hypothecated claims as long as it may not be set up against them in the same way as an assignment of claim.

In order for it to be possible to set up a hypothec on a claim against the debtor of the claim, then, the hypothecary creditor must comply with the requirements of arts. 1641 *et seq.* C.C.Q., which deal with assignment of claims. Accordingly, at least in theory, the creation of a complete pledge of a claim, whether or not the claim is represented by a negotiable instrument, involves three conceptual steps: the granting of the pledge by handing over the property or title to the hypothecary creditor; the publication of the pledge by the creditor holding the property or title; and the fact that the pledge may be set up against the debtor of the claim, which is brought about in the same way as for an assignment of claim:

see L. Payette, *Les sûretés réelles dans le Code civil du Québec* (2nd ed. 2001), at pp. 359-60.

13 In the case of a negotiable instrument, art. 2709 expressly provides that the "remittance" (*remise*) required by art. 2702 takes place, depending on the nature of the title that is hypothecated, by endorsement and delivery or by delivery alone. In each case, the effect of the transaction in question is indisputably that the hypothecary creditor then holds the claim represented by the title, because the creditor, having a validly transferred negotiable instrument in his or her hands, is free to exercise rights in it without the consent of the hypothecary debtor who handed it over to him or her. On the one hand, as art. 1647 indicates, a claim attested by a bearer instrument may be assigned by "mere delivery" (*simple tradition*), to another bearer, of the instrument attesting it. Physical delivery of the title is therefore sufficient to give the creditor effective control of the claim. On the other hand, in the case of a title that is negotiable by endorsement and delivery, for example a cheque, "mere delivery" as provided in art. 1647 will be insufficient: in order for the creditor to exercise rights in that claim, the title must also be endorsed. That is why the legislature supplemented art. 1647 with art. 2709, which requires endorsement as an integral part of the "remittance" required by art. 2702 in order to create the pledge. The concept of "remittance" is therefore not identical to the "mere delivery" required by art. 1647: while "mere delivery" refers to physical delivery, the "remittance" required by art. 2702 refers, rather, to the transaction by which the creditor obtains control over the hypothecated claim: in this specific case, the endorsement and delivery of the title. Accordingly, where a negotiable instrument is pledged, the effect of the procedure set out in art. 2709 is to complete the three conceptual steps described earlier: once the title is remitted to the creditor by endorsement and delivery or by delivery alone, as the case may be, the pledge has been given and published and may be set up against the debtor of the claim. In other words, holding the title takes the place of holding the claim itself, because it, in and of itself, gives the hypothecary creditor effective control of the claim.

14 But what about a claim that is not represented by a negotiable instrument? In that case, mere physical delivery of the non-negotiable instrument that attests the claim, for example a contract or invoice, is not sufficient for a hypothecary creditor to genuinely hold the title within the meaning of art. 2703, because it does not convey effective control of the claim represented by the title. Physical delivery of a non-negotiable instrument has no legal effect between the parties, in the sense that it does not permit the hypothecary creditor himself or herself to exercise the rights provided by the title, and to exercise rights in the claim in the event of default. It therefore cannot, by itself, constitute the "remittance" required by art. 2702. That is why the legislature has provided a procedure for such cases that enables the hypothecary creditor to obtain effective control of the hypothecary claim, by making it possible for the creditor's right to be set up against the debtor of the claim. That procedure is the one set out in art. 2710 C.C.Q., which requires the setting up of a hypothec on a claim against the debtor of the claim in the same way as an assignment of claim. In the case of a claim not represented by a negotiable instrument, the requirements that must be met in order for it to be set up against the debtor of the claim are stated in art. 1641, the first paragraph of which reads as follows:

> An assignment may be set up against the debtor and the third person as soon as the debtor has acquiesced in it or received a copy or a pertinent extract of the deed of assignment or any other evidence of the assignment which may be set up against the

assignor.

This article does not require that complex formalities be followed: the debtor of the claim need only acquiesce in the hypothec, or receive a copy or a pertinent extract of the deed or "any other evidence of the assignment which may be set up against the assignor". When one of those requirements has been met, the pledge of the claim may be set up against the debtor. Accordingly, where the hypothec granted gives the hypothecary creditor the right, in the event of default, to collect the hypothecary claim directly without obtaining further authorization from his or her debtor, the creditor will have obtained effective control of the claim and a valid pledge that may be set up against third persons will have been created.

15 Where the claim is not represented by a negotiable instrument, the "remittance" required by art. 2702 therefore refers not to mere physical delivery but rather to the act that actually gives the creditor control of the claim, that is, the debtor's acquiescence in the pledge or the proof that allows it to be set up against the debtor, in accordance with art. 1641. This distinction is similar to the distinction referred to earlier between "mere delivery", which is sufficient, under art. 1647, to result in the bearer holding a title, and the "remittance" required by art. 2709, which further requires endorsement where endorsement is necessary in order for the creditor to hold a title that is negotiable by endorsement and delivery. The distinction between physical delivery of a property and actual remittance is also illustrated by art. 2702, which provides that where the property is already in the hands of the creditor the pledge may be granted by merely changing the nature of the creditor's holding of it, which does not require any physical delivery.

16 Accordingly, where the pledge relates to a claim that is not represented by a negotiable instrument, the procedure set out in arts. 2710 and 1641 is in line with the procedure set out in art. 2709 for negotiable instruments. The procedure in question allows for the three conceptual steps in the pledge of a claim: once it has become possible for the creditor's right to obtain payment in the event of default to be set up against the debtor of the claim under art. 1641, the creditor obtains effective control of the claim and the pledge has then been granted and published. As well, given that physically leaving a title, even if it is a non-negotiable instrument, in the hands of the debtor could mislead third persons by suggesting that the debtor continues to be able to freely dispose of the claim, it will also be necessary, where there is such a title and it is possible to hand it over, that it be physically handed over to the creditor in order that the remittance required by art. 2702 be complete. It therefore seems to me that in the provisions of the new Code the legislature has set out all of the requirements for granting a pledge of a claim not represented by a negotiable instrument, whether or not it is attested by a non-negotiable instrument.

17 It should be noted that, contrary to what my colleague Deschamps J. asserts (at paras. 69, 73 and 104), art. 1641, para. 1 does not necessarily require a writing. What that article provides for are three separate ways whereby the assignment may be set up against the debtor of the claim and third persons: acquiescence by the debtor in the assignment, receipt by the debtor of a copy or a pertinent

extract of the deed of assignment, or receipt by the debtor of any other evidence of the assignment which may be set up against the assignor. Accordingly, in the context of a hypothec with delivery relating to a claim, the second procedure is the only one that requires that there be a writing attesting the pledge. In any other case, acquiescence or receipt of evidence of the assignment will be sufficient to allow the pledge to be set up against the debtor and third persons, and therefore to give the creditor effective control of the claim, with no writing being necessary.

18 In practice, to facilitate proof of such a pledge and to establish the terms on which it may be exercised, it may be desirable for the pledge to be evidenced by a writing, which may then be communicated to the debtor of the claim to allow the claim to be set up against him or her. However, I disagree with my colleague when she states that "the terms on which it may be set up against the debtor of the claim assigned — which presuppose a writing — are foreign to the simplicity that is inherent in granting a pledge" (para. 69). First, as I explained above, art. 1641 does not necessarily presuppose a writing; the parties may rely on acquiescence by the debtor or any other evidence of the assignment which may be set up against the assignor. Second, the possibility of relying on a writing to record the pledge, and sometimes even the obligation to do so, are already provided for in the Code in certain circumstances. For example, escrow, when the property is held by a third person for the benefit of a pledge-holder, is an integral part of the traditional concept of pledge; art. 2705 C.C.Q., however, requires a writing in order to publish the pledge:

> **2705.** The creditor, with the consent of the grantor, may hold the property through a third person, but if so, detention by the third person effects publication only from the time the third person receives evidence in writing of the hypothec. [Emphasis added.]

As well, it is acknowledged that the pledge may, optionally, be attested by a writing that will facilitate proof of it, and that publication of the pledge may even be supplemented by registration (art. 2707). In addition, the very acknowledgement that a claim may be hypothecated by handing over the negotiable instrument that represents it makes remittance of a writing an essential requirement for that kind of pledge. Accordingly, it seems to me to be incorrect to suggest that the writing is fundamentally inconsistent with the concept of pledge.

19 There is nothing "contingent" or "purely potestative" about acquiescence by the debtor in the claim, where the parties decide to adopt that procedure; on the contrary, it is difficult to imagine that, if the legislature considered that requirement to be sufficient to allow for an assignment of the claim to be set up against third persons by operation of law (art. 1641 C.C.Q.), it would then be inadequate or shocking when applied to publication of a pledge, which is a lesser right. The agreement among the three parties makes it impossible to grant a subsequent pledge of the same claim to a third person. As well, it enables the third person in question to become aware of the existence of the pledge by inquiring of the debtor of the claim.

20 The approach I prefer is also consistent with the law that applies to a pledge of claims in the civil law countries. For example, French civil law has long recognized pledges of claims not represented by a negotiable instrument: see, *inter alia*, H., L. and J. Mazeaud and F. Chabas, *Leçons de droit civil*, t. III, vol. 1, *Sûretés: Publicité foncière* (7th ed. 1999), by Y. Picod, No. 65, at p. 145; P. Malaurie and L. Aynès, *Cours de droit civil*, t. IX, *Les sûretés: La publicité foncière* (7th ed. 1995), by L. Aynès, Nos. 518-25, at pp. 197-202. The terms by which that kind of pledge operates have changed in recent decades. First, art. 2076 of the French Civil Code ("C.C."), which has never been amended and which applies to all pledges, requires, as do arts. 2702 and 2703 C.C.Q., that the creditor be put in possession; it provides:

> [TRANSLATION] In all cases the privilege only subsists over the pledge where such pledge has been placed and has continued in the possession of the creditor, or of a third person agreed on between the parties.

Second, after it was last amended on July 12, 1980, art. 2075 C.C. reads as follows:

> [TRANSLATION] Where the pledge is granted on incorporeal movables such as movable claims, the authentic act or act under private seal, duly registered, shall be served on the debtor of the claim given in pledge, or accepted by the debtor in an authentic act.

This article refers to the formalities in art. 1690 C.C. which, like art. 1641 C.C.Q., deals with assignment of claims.

21 Before 1983, it was thought that the coexistence of those two articles required, in the case of claims not represented by a bearer instrument, that the creditor obtain physical possession of the non-negotiable instrument (to satisfy art. 2076 C.C.) and that the pledge was served on the debtor (to satisfy art. 2075 C.C.). Although that requirement continues to apply where physical delivery of the title is possible, the Cour de cassation held, in a decision dated May 10, 1983, that where the pledge relates to a claim for which delivery is physically impossible, it is sufficient, to put the creditor in possession, to serve notice of the pledge on the debtor of the claim. Physical delivery of a non-negotiable instrument is therefore not necessary in such cases: *Soc. suisse d'assur. Winterthur v. Soc. anon. Réaltrade*, Cass. civ. 1re, May 10, 1983, D.1984.433, note Légier. It is therefore generally acknowledged that French law, which currently recognizes pledges of claims not represented by a negotiable instrument, is moving toward an approach that relies on service of notice as the only requirement for granting a pledge and to allow it to be set up against third persons: see M. Cabrillac and C. Mouly, *Droit des sûretés* (5th ed. 1999), No. 686, at pp. 546-47; see also Malaurie and Aynès, *supra*, No. 524, at p. 201; P. Simler and P. Delebecque, *Droit civil: Les sûretés — La publicité foncière* (2nd ed. 1995), No. 537, at pp. 440-41. That approach is consistent with the one taken by German law (see art. 1280 of the German Civil Code) and Swiss law (see art. 900 of the Swiss Civil Code), which currently consider service of

notice on the debtor of the claim to be sufficient to publish the pledge.

22 In addition to being consistent with the civil law institution of pledge, the approach adopted above also has the advantage of being compatible with the most recent developments in the North American law of real security. Legislation in relation to personal property security that has been enacted in the common law provinces of Canada allows individuals to grant security interests in claims that are not represented by negotiable instruments, which are considered to be intangibles. Such security interests must be published by registration to allow them to be set up against third persons: see, for example, the *Personal Property Security Act*, R.S.O. 1990, c. P.10, s. 23.

23 This technique is, of course, different from the pledge as it is envisioned by the *Civil Code of Québec*, which has more in common with the perfection by possession provided for by s. 22 of the *Personal Property Security Act*, a technique which is available for only certain types of collateral, not including intangibles. However, in the last two years a type of security interest in claims has emerged in the United States that has a great deal in common with a pledge of claims as it is found in the civil law countries referred to earlier. Since July 2001, all of the American states have adopted a revised version of Article 9 of the *Uniform Commercial Code* (1999 rev.), which governs real security interests, the earlier version of which had been used as a model for both Canadian legislation on the subject and for the draft produced by the Civil Code Revision Office (see *Report on the Québec Civil Code* (1978), vol. II, t. 1, *Commentaries*, at p. 347). The new version introduces the concept of publication by control of certain forms of security interests relating to claims that were formerly regarded as general intangibles, for instance claims relating to money held in bank accounts. Section 9-314 provides that a "security interest in . . . deposit accounts . . . may be perfected by control of the collateral under Section 9-104 . . . .", para. (a) of which provides:

> (a) A secured party has control of a deposit account if:
>
> (1) the secured party is the bank with which the deposit account is maintained;
>
> (2) the debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the account without further consent by the debtor; or
>
> (3) the secured party becomes the bank's customer with respect to the deposit account. [Emphasis added.]

The three situations listed in para. (a) are clearly equivalent to the concept of "control" or "effective control", in that they describe situations in which the creditor holds the claim in that manner. It is worth noting that subpara. (2) describes a situation that is virtually identical to the one agreed to by the parties in this case.

24 Accordingly, adoption of the criterion described above in the case of a pledge of claims not represented by a negotiable instrument as provided by the *Civil Code of Québec* reflects the general development of the law of security interests in claims of that nature, as well as providing Quebecers with a form of access to credit that is generally available elsewhere in the world, and fostering a degree of uniformity in this area, one that is crucial to the conduct of numerous business activities, while remaining faithful to the letter and spirit of the *Civil Code of Québec* and the civil law origins of the concept of pledge. This is consistent with the general approach adopted by the legislature as described by Professor R. A. Macdonald in "Change of Terminology? Change of Law? An Overall Assessment of the Provisions of the *Civil Code of Québec* Relating to Prior Claims and Hypothecs" (1992), 23 *R.G.D.* 357, at pp. 358-59:

> The various proposals presented during the fifteen year legislative gestation of this part of the Civil Code clearly reveal that the intention of the government was to modernize the law of security on property along the general functionalist lines of Article 9 of the U.C.C., but to retain as an overarching framework the existing civil law approach to the subject.

25 This modernization is on all fours with one of the objectives of the reform of the law of security: to permit and foster access by individuals and enterprises in Quebec to credit secured by movable security. In *Perron-Malenfant*, *supra*, a unanimous opinion of this Court, I explained that policy as follows (at paras. 50-51):

> In my view, arts. 2552 and 2554 demonstrate a careful balancing of the relevant considerations. Protection was accorded, but carefully circumscribed, to certain family beneficiaries, and to irrevocable beneficiaries. Underpinning these limits on protection of the family in arts. 2552 and 2554 was the legislature's desire to maximize the financial utility of insurance policies in the hands of their owners, illustrative of another broad policy pursued by the legislature in the revision of the *Civil Code*, namely the creation of a legal context within which individuals would better be able to use their moveable assets to secure credit.
>
> This policy is evident in the new *Civil Code of Quebec*, S.Q. 1991, c. 64, which contains a general regime of hypothecs on moveable property (arts. 2696-2714 *C.C.Q.*). [Emphasis added.]

26 This approach is also consistent with the objectives of protecting debtors and standardizing the various kinds of real security that were available under the *Civil Code of Lower Canada* ("C.C.L.C."), by introducing a general set of rules for consensual hypothecs. Although the new scheme indisputably contains provisions that are designed to limit access to certain forms of hypothec, those provisions are not the only manifestation of the legislature's objective of protection, and interpretation of those provisions must not be confused with the analysis of the scope of the provisions relating to the pledge. For example, while art. 2683 C.C.Q. prohibits a natural person who does not operate an enterprise from granting a movable hypothec without delivery, it does not apply in the case of a movable hypothec with delivery granted in accordance with the requirements set out in the Code. The two schemes are markedly different, in particular because of the fact that effective control of the claim by the hypothecary creditor, which is necessary for a pledge, prevents the debtor from making any other use of the claim, for example by granting further hypothecs on it. Moreover, a movable hypothec on claims without delivery, which is published by registration, gives the creditor greater flexibility than a pledge in that it allows him or her to delay the possibility of setting the hypothec up against the debtor and thus avoid having to carry out the applicable formalities until necessary, that is, in the event of default. This flexibility obviously has considerable practical advantages in the context of operating an undertaking in which the legislature has provided for the use of a movable hypothec without delivery (art. 2683).

27 As well, incorporating pledges of claims into the general scheme of hypothecs provides the debtor with considerably broader protection than under the scheme in the former Code. One of the major criticisms of assignment of claims as security under the C.C.L.C. was that it allowed the creditor to include a clause that permitted it, in the event of default, to appropriate the claim, without the debtor being protected by the provisions that applied to the exercise of hypothecary remedies: see art. 1971, para. 2 C.C.L.C. The situation is completely different in the case of a pledge of a claim under the new Code. Giving in payment clauses are prohibited by art. 1801 C.C.Q. In the event of default, the provisions of the Code governing hypothecary remedies must be adhered to, and so the debtor will have the protection of all of the provisions relating to hypothecs on claims: see P. Ciotola, *Droit des sûretés* (3rd ed. 1999), at p. 239. An example of this is art. 2747 C.C.Q., which prohibits a creditor from reserving the right to keep sums collected over and above the obligation secured by hypothec. Accordingly, the approach I have adopted, far from extending the reach of pledges of claims under the former Code, rather recognizes that they have been incorporated into the general scheme governing hypothecs on claims established by the *Civil Code of Québec*, which contains a number of protections that were formerly not applicable.

(2) *Application to the Facts*

28 A movable hypothec with delivery on a non-negotiable claim is therefore validly granted and published where (i) the debtor has transferred effective control of the claim to the creditor by giving the creditor the right to collect directly in the event of default, without further authorization by the debtor; (ii) where the claim is evidenced by a non-negotiable title which it is possible to hand over, such

title has been handed over to the creditor; and (iii) the necessary steps have been taken so that the hypothec may be set up against the debtor of the claim in accordance with art. 1641 C.C.Q.

29 In this case, the certificates of deposit issued by Desjardins Trust represent the debtor's claims against it. Because those certificates, by their own terms, are not negotiable, it is clear that mere physical delivery of them to the Caisse was not sufficient to create and publish the pledge. However, it is also clear that the parties to the pledge did not stop at mere physical delivery. On the contrary, they expressly agreed that in the event of default, the Caisse could obtain payment from Desjardins Trust without obtaining further consent from the debtors. Clause 7 of the contract of movable hypothec reads as follows:

> [TRANSLATION] In the event of a default as provided in the credit contract, the Caisse is irrevocably authorized to seek payment from Desjardins Trust of all or part of the hypothecated amounts in order to remedy such default, up to a maximum of the amount of this hypothec. [Emphasis added.]

In addition, clause 4 of that contract provides that [TRANSLATION] "[t]he Caisse is the only party authorized to collect the claim from Desjardins Trust".

30 In each case, this contract was signed by the representatives of the Caisse and Desjardins Trust. The latter therefore acquiesced in it within the meaning of art. 1641, para. 1 C.C.Q. This was all in conformity with the provisions of the certificates issued by Desjardins Trust which, although they were not negotiable or transferrable, expressly provided that they could be given as security, but only to the issuing Caisse. Desjardins Trust would not have permitted the debtors to withdraw the moneys in question without the authorization of the Caisse. The debtors themselves no longer held the certificates — which in any event were not negotiable — and could not have collected the principal and accrued interest before maturity.

31 Given these circumstances, it is clear that the bankrupts had transferred effective control of their claims against Desjardins Trust to the Caisse, and that the agreement could be set up against Desjardins Trust. The fact that the claims were held by the Caisse was sufficient, having regard to the clear intention of the parties, to grant and publish a pledge of those claims. Accordingly, the Caisse held a movable hypothec with delivery that it could set up against the trustee.

32 I would therefore allow the appeal with costs throughout.

English version of the reasons of Binnie, LeBel and Deschamps JJ. delivered by

33 DESCHAMPS J. (dissenting) — A primary issue is whether a non-negotiable instrument may be the object of a pledge under the *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."); a secondary issue concerns the civil effect of a violation of a provision of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("ITA").

34 During 1993, Berthold Blouin and Chantal Bérubé, who were husband and wife (annuitants), subscribed to a standard retirement savings plan offered by the Caisses populaires Desjardins. They signed a statement establishing the terms of the plan. Those terms provided that the plan complied with the ITA and that contributions would be held by Desjardins Trust Inc. ("Desjardins Trust") on behalf of the annuitant until the plan matured. The contributions were to be deposited in a retirement savings account at a caisse selected by the annuitant.

35 Each of the annuitants contributed to the plan, and the moneys were deposited at the Caisse populaire Desjardins de Val-Brillant ("Caisse"). The Caisse issued four deposit certificates in the name of Desjardins Trust, totalling $10,196.54, which matured during 1998. The deposits could not be withdrawn before maturity, and were neither negotiable nor transferrable. The certificates stated that the deposits could not be given as security other than to the Caisse.

36 During 1997, the annuitants contacted the Caisse seeking repayment of their contributions. Because the deposits had not reached maturity, the Caisse proposed that it lend them the sum of $7,390. However, it required security. Each of the annuitants signed a document entitled [TRANSLATION] "Movable hypothec on moneys accumulated in a retirement savings plan". The document contained the usual hypothecary clauses, including the right of the Caisse, in the event of default by the annuitants, to ask Desjardins Trust to remedy the default, up to the amount of the hypothec. The Caisse held the deposit certificates. According to the appellant, the hypothecs were accepted by Desjardins Trust.

37 On November 19, 1997, the annuitants made an assignment in bankruptcy. The respondent, Métivier et Associés inc., became the trustee. On December 16, 1997, the Caisse submitted proof of claim as a secured creditor, in the amount of $10,196.54. It also gave the debtors notices of accelerated payment and asked the trustee to confirm that it was authorized to exercise its security. On February 23, 1998, it completed the RRSP withdrawal forms. Desjardins Trust remitted the amount of the deposits to the Caisse, to the value of the balance of the loans after tax was withheld. In 1998, Desjardins Trust first issued the tax statements in respect of the use of the RRSPs as security, and subsequently issued the statements in respect of the extinction of the security.

38 On September 2, 1998, the trustee in bankruptcy informed the Caisse that it was rejecting its secured claim and was treating the Caisse as an ordinary creditor. The Caisse appealed that decision to the Superior Court. The Superior Court found that the deposit certificates were negotiable instruments that could be hypothecated with delivery by the Caisse's holding of them. The court held that the ITA imposed penalties for the use of the RRSPs as security, but did not prohibit it.

39 The trustee appealed. The Court of Appeal held that the plan was depositary and not fiduciary in nature, and as such was governed by s. 146(2) ITA. It then stated that because the registration of the plan had not been cancelled, despite the fact that it was used as security, the funds were held not by the Caisse, but by Desjardins Trust. The Court of Appeal held that only a negotiable instrument could be the object of a movable hypothec with delivery. In the opinion of the court, however, the deposit certificates were not negotiable instruments. In the alternative, it held that if there could be a movable hypothec on a non-negotiable instrument, it would have to be registered in the Register of Personal and Movable Real Rights in order for it to be set up against third persons, and this had not been done. The Court of Appeal restored the decision of the trustee in bankruptcy.

40 On September 16, 2002, this Court allowed a motion to adduce new evidence in respect of the first ground on which the Court of Appeal based its conclusion. That ground had been raised by the Court of Appeal on its own initiative, and there had been no evidence introduced in respect of it in the lower courts. The evidence consists of a letter in which the Registered Plans Directorate of the Canada Customs and Revenue Agency stated that the retirement savings plan offered by the Caisses populaires Desjardins of which the annuitants were members had been approved as a trustee-type plan, and not a depositary-type plan.

41 In this Court, the appellant challenges the three conclusions of the Court of Appeal. In the appellant's submission, the ITA does not prohibit the use of an RRSP as security, the C.C.Q. authorizes the pledge of non-negotiable instruments and registration in the Register of Personal and Real Rights is not necessary for publication of the pledge. The argument in respect of the ITA may be addressed succinctly to begin.

## I. Impact of the ITA on the Hypothec

42 It is settled law that the legislature may assign tax consequences to a juridical act that are different from the consequences that follow under the rules of the civil law. The specific rules of the private law of each province are not binding on Parliament, and, subject to the requirements of public order and its constitutional constraints, it may attribute the tax consequences of its choice to a juridical act: J.-M. Brisson and A. Morel, "Droit fédéral et droit civil: complémentarité, dissociation" (1996), 75 *Can. Bar Rev.* 297, at pp. 304 and 320-21; *Whaling (Bankrupt), (Re)* (1998), 117 O.A.C. 51; *Cie Trust Royal v. Caisse populaire Laurier*, [1989] R.J.Q. 550 (C.A.); *Gallucci (Syndic de)*, J.E. 93-617 (Sup.

Ct.).

43 Obviously, the vehicle chosen by the Caisses populaires cannot be characterized as a trust in the civil law sense, because the annuitants were still the owners (or creditors) of the funds invested (art. 1260 C.C.Q.). Parliament may, however, call a plan a trust even if the plan cannot be characterized as such under the rules of Quebec's civil law.

44 Section 248 ITA provides, for the province of Quebec, that an arrangement may be deemed to be a trust if it meets certain requirements. In this case, the tax authorities characterize the RRSP in which the annuitants have invested as a trust, and there is nothing in the evidence that would allow that characterization to be questioned.

45 Nonetheless, it is useful to ascertain whether the provisions that are applicable to trust plans operate to prohibit the use of the moneys held in such a plan as security, and what the consequences of using such moneys as security are.

46 The relevant provisions of the ITA are ss. 104(1) and 146(1), (2), (7), (10), (12) and (13) (see the appended excerpts). It is plain from those provisions that there is no prohibition on using the moneys held in a trust RRSP as security. Section 146(10) sets out the consequence of using the moneys as security. If the trust (in Quebec, the trustee) permits property to be used as security for a loan, the fair market value of the property must be included in computing the income of the annuitant.

47 In this case, Desjardins Trust issued tax statements based on the use of the moneys held in the RRSP as security, as provided by the ITA in the case of such use. The juridical act by which the moneys were given as security is not a nullity.

48 The rules of tax law cannot be used to determine the validity of the hypothec that the annuitants intended to grant. That determination must be based on the civil law.

II. Validity of the Hypothec

49 The annuitants intended to grant the Caisse a movable hypothec with delivery on the

moneys that had accumulated in their retirement savings plan. However, because the debtor's property is the common pledge of the creditors (art. 2644 C.C.Q.), it is not sufficient for a debtor to intend to grant that form of preference. The debtor must do so in accordance with the rules of the C.C.Q. In this case, to secure the repayment of the loan, they gave a movable hypothec with delivery. They intended to grant the pledge by handing over the deposit certificates. Were those deposit certificates titles that could validly form the object of a movable hypothec with delivery?

50 The word "title" (*titre*) in art. 2702 C.C.Q. is central to this case. That article reads as follows:

> **2702.** A movable hypothec with delivery is granted by delivery of the property or title to the creditor or, if the property is already in his hands, by his continuing to hold it, with the grantor's consent, to secure his claim.

51 There are two conflicting interpretations, over which the literature is divided. The first is that the word "title" encompasses non-negotiable titles: L. Payette, *Les sûretés réelles dans le Code civil du Québec* (2001), at p. 362. The second recognizes only negotiable instruments as the object of movable hypothecs with delivery: M. Deschamps, "La fiducie pour fins de garantie", in *Contemporary Utilisation of Non-Corporate Vehicles of Commerce*, (1997), 133, at pp. 139-44; D. Pratte, *Priorités et hypothèques* (1995), at p. 112; M. B. Rhéaume, "Le gage des valeurs mobilières par un particulier" (1995), 98 *R. du N.* 90, at p. 96.

52 The word "title" has numerous meanings. In its broad legal sense, it encompasses any writing attesting a juridical act. It includes, for example, the document attesting a lease, or a deposit. Clearly, the legislature did not intend to cover every kind of title. In order to interpret that word, therefore, it is worthwhile to examine the concept of movable hypothec with delivery. It will be useful, however, to determine beforehand the nature of, first, the juridical act that the annuitants performed when they invested in their RRSP, and second, the deposit certificates.

A. *The Nature of the RRSP and the Deposit Certificates*

53 The legal status of an RRSP has been examined by the courts on numerous occasions. Suffice it to mention the decision of this Court in *Poulin v. Serge Morency et Associés Inc.*, [1999] 3 S.C.R. 351, or the decision of the Quebec Court of Appeal in *Cie Trust Royal*, *supra*. It is not a nominate contract in the C.C.Q. and we must analyze the terms of each RRSP in order to determine its nature.

54 In the case of the standard Desjardins RRSP, the annuitant invests with Desjardins Trust so that Desjardins Trust holds the funds in accordance with the obligations imposed on it by the ITA. Because the annuitant is the creditor of the moneys invested, that transaction is treated as if it were a deposit in a financial institution, such as a deposit in a bank account. The courts have often characterized that transaction as a loan (*Cie Trust Royal*, *supra*). Desjardins Trust holds the funds until the plan matures. It also agrees to deposit the funds in a Caisse populaire chosen by the annuitant, in this case the Caisse. In accordance with that agreement, Desjardins Trust in turn lends the funds to the Caisse. Up to that point, the only legal relationship created by the plan is a relationship between creditor and debtor under successive but coordinated agreements for the loan of money. These are rights of claim, and thus personal rights.

55 The Caisse chooses to issue deposit certificates. That vehicle is not governed by any particular statute, as are, for instance, bills of exchange. This is therefore a contract that must be interpreted using the stipulations that it contains.

56 The certificates issued in this case provide that Desjardins Trust is the beneficiary on behalf of the annuitants. The Caisse thereby acknowledges that it is indebted to Desjardins Trust, but it also acknowledges that Desjardins Trust is acting on behalf of the annuitants. The certificates contain clauses providing that they are neither negotiable nor transferable and that they may be used as security only with the issuing Caisse populaire.

57 The deposit certificates are the written representation of Desjardins Trust's claim against the Caisse, and of the Caisse's acknowledgement of the annuitants' claim against Desjardins Trust in respect of the RRSP. Two rights of claim were set out in the same document. With respect to the relationship between Desjardins Trust and the annuitants, the most precise characterization that can be made of the certificates is that they are *sui generis* titles setting out the claim that the annuitants may assert against Desjardins Trust, which claim is itself implicitly subject to the provisions of the ITA and the terms of the contract between the Caisse and Desjardins Trust.

58 In order to determine whether those *sui generis* titles may be the object of a movable hypothec with delivery within the meaning of the C.C.Q., we need to identify the characteristics of the concept of pledge.

B. *Concept of Pledge*

59 A movable hypothec with delivery, also called "pledge" (art. 2665 C.C.Q.), is the contract by which a debtor hands over a property to his or her creditor as security. Pledge differs from other hypothecs in that it is granted by simply handing over the property charged to the creditor (art. 2702 C.C.Q.). No writing is necessary as it is for a hypothec without delivery (art. 2696 C.C.Q.). This simple method of granting security provides the creditor with all of the powers associated with a hypothec without any further formality or publication (art. 2703 C.C.Q.). The literature is unanimous in recognizing that it is control of the property by the creditor that characterizes a pledge (Payette, *supra*, and Deschamps, *supra*).

60 The creditor obtains that control by the simple handing over of the property. By that operation alone, the security is granted and the holding publishes it. Individuals may use the pledge for their personal property, but, unless otherwise provided, they may not grant a hypothec without delivery (art. 2683 C.C.Q.). The method of granting a pledge is elementary and accessible by everyone. Despite its simplicity, there are limits in the concept. The only property that may be the object of a pledge is property which can be controlled by the creditor by simply handing it over. The word "title" in art. 2702 C.C.Q. must therefore be confined within the boundaries of the concept in respect of which it is used.

C. *Pledge of a Title*

61 In order to be the object of a pledge, the title must be one that complies with the characteristics of that kind of security. There are no special rules for the pledge of titles. Merely handing over the title must be sufficient to grant the pledge (art. 2702 C.C.Q.), to publish it by the holding (art. 2703 C.C.Q.), and to permit the creditor to exercise its rights (art. 2743 C.C.Q.). The legislature did not provide that a pledge with delivery must be accompanied by a writing, stating and publishing the rights and obligations of the parties. However, it did make special rules for hypothecs on claims. In order for hypothec with delivery to be included coherently in the concept of pledge, a hypothec with delivery on a title attesting a claim must both comply with the general rules of pledge and be compatible with the rules that apply to a hypothec on claims.

D. *Characteristics of the Pledge of a Title Attesting to a Claim*

62 When the C.C.Q. was enacted in 1991, the legislature used a legal fiction when it included titles in the properties that may be given in pledge. As a general rule, a title is merely the attestation and pre-established evidence of a juridical act or a property. It is not the property itself; the property and the documentary medium in which it is expressed do not become one and the same. Accordingly, a title of claim constitutes the representation of the right of one party to claim against another party. It is therefore only when this legal fiction is applied that the fact that the creditor of a pledge may have a claim must be recognized.

63 As the *Bills of Exchange Act*, R.S.C. 1985, c. B-4, and the C.C.Q. provide, the legal fiction is consistent with the rights inherent in possession of a negotiable instrument. There is in fact no doubt that such an instrument may be given in pledge. Since non-negotiable instruments other than titles of claim are not relevant to the issue in this case, I shall restrict my comments to non-negotiable titles of claim such as the deposit certificates held by the appellant.

64 Article 2702 C.C.Q. does not specify the nature of the titles of claim that may be held in pledge. However, some information that can be used in this interpretation may be found in the provisions governing hypothecs on claims.

65 In the section entitled "Movable hypothecs on claims", the legislature deals with an issue that is not expressly addressed in the articles concerning pledge: whether or not the hypothec may be set up against the debtor of the hypothecated claim. Article 2710 C.C.Q. provides that the holder of the hypothec may not set up his or her right against the debtor of the hypothecated claim as long as it may not be set up in the same way as an assignment of claim:

> **2710.** A movable hypothec on a claim held by the grantor against a third person or on a universality of claims may be granted with or without delivery.
>
> However, in either case the creditor may not set up his hypothec against the debtors of hypothecated claims as long as it may not be set up against them in the same way as an assignment of claim.

66 In the case of a pledge of claims, it is surprising, at first glance, that an additional formality would be required. Article 2703 C.C.Q. already provides that a pledge is published simply by holding the title. That article reads as follows:

> **2703.** A movable hypothec with delivery is published by the creditor's holding the property or title, and remains so only as long as he continues to hold it.

67 We need to analyze this question further, however — first, because art. 2703 C.C.Q. deals with publication and therefore with third persons in general, and second, because art. 2710 C.C.Q. does not specify the provisions of the section dealing with assignments of claim the creditor should refer to in

order to be able to set up his or her hypothec with or without delivery.

68 Under art. 1641 C.C.Q., there are three ways for a creditor to arrange that the assignment — or hypothec — may be set up against the debtor: by acquiescence, by delivering a copy, extract or other evidence of the assignment, or, where the debtor cannot be found in Quebec, by publication of a notice of assignment:

> **1641.** An assignment may be set up against the debtor and the third person as soon as the debtor has acquiesced in it or received a copy or a pertinent extract of the deed of assignment or any other evidence of the assignment which may be set up against the assignor.
>
> Where the debtor cannot be found in Québec, the assignment may be set up upon publication of a notice of assignment in a newspaper distributed in the locality of the last known address of the debtor or, if he carries on an enterprise, in the locality where its principal establishment is situated.

For the purposes of this appeal, I will ignore the exception provided for a debtor who cannot be found in Quebec.

69 Article 1641 C.C.Q. contains the implied requirement that the assignment — or hypothec — be set down in writing (M. Tancelin, *Des obligations: actes et responsabilités* (6th ed. 1997), at pp. 649-50). It is the deed of assignment that is brought to the attention of the debtor of the claim. While that formality does not cause a problem for a hypothec without delivery, it cannot be required for a hypothec with delivery without altering its nature: the terms on which it may be set up against the debtor of the claim assigned — which presuppose a writing — are foreign to the simplicity that is inherent in granting a pledge. They must be rejected.

70 The first method by which a claim may be set up against the debtor under art. 1641 C.C.Q. might make it possible to connect acquiescence to the assignment rather than to the deed of assignment. If those words were interpreted literally, acquiescence could be regarded as a way of making it possible to set the hypothec up against the debtor of the claim.

71 In my opinion, that interpretation cannot be adopted. It is not compatible with the concept of pledge for a hypothec on a title of claim, granted without a writing, to require the acquiescence of the debtor of the claim in order for it to be set up against him or her. There are a number of compelling reasons for this conclusion.

72 First, the general rule is that the debtor's patrimony is subject to the general pledge of the creditors. In order to preserve the order of distribution and balance among the creditors, the pledgee's rights must be clearly circumscribed, once all of the requirements for granting and publishing the pledge have been met. That objective could not be achieved if the pledgee's rights were dependent on the whim of the debtor of the claim. The purely potestative nature of the debtor's acquiescence offends the philosophy inherent in the law of security. Second, accepting that interpretation would amount to agreeing that the legislature has permitted a very limited type of hypothec to be created, and has made the only way in which it could be set up against the debtor or a third person dependent on the occurrence of the aleatory event of acquiescence by the debtor of the hypothecated claim. Article 1641 C.C.Q. shows that acquiescence is not the sole method by which it becomes possible for a claim to be set up against those person; rather, it is an alternative method.

73 A pledge, which is granted simply by handing over the property, cannot depend on the will of the debtor of the claim that is pledged in order for it to be possible to set it up against him or her. In my opinion, art. 1641 C.C.Q. cannot be harmoniously incorporated into the concept of a hypothec with delivery. The rule set out in art. 1641 C.C.Q. for setting the claim up against the debtor is limited to a hypothec without delivery, and applies in full to security of that nature. A hypothec without delivery must be granted in writing (art. 2696) and published by registration (art. 2663), and may be set up against the debtor by acquiescence or by delivery of a copy.

74 By way of contrast, under art. 1647 C.C.Q., which is found in the subsection entitled "Assignment of claims attested by bearer instrument", all of the characteristics of a pledge can be reconciled with the provisions concerning assignments of claims, to which we are referred by art. 2710 C.C.Q.:

> **1647.** It is of the essence of a claim attested by a bearer instrument issued by a debtor that it may be assigned by mere delivery, to another bearer, of the instrument attesting it.

75 Under that article, in the case of an assignment of a bearer instrument, no formality other than delivery need be performed in order to be able to set up the assignment against the debtor of the claim. The mechanism of art. 1647 C.C.Q., established by reference (art. 2710 C.C.Q.), is the same as the one provided in the section on movable hypothec with delivery (arts. 2702 C.C.Q. *et seq.*). In both cases, handing over or delivery is sufficient to give the creditor complete control of the property.

76 I am deliberately refraining from analyzing the difference in the terminology used in arts. 1647 and 2709 C.C.Q. I use the generic expression "negotiable instrument" because it is not

necessary, in this case, to examine the distinctions that may be made between a bearer instrument (*effet au porteur*) within the meaning of the *Bills of Exchange Act*, a bearer instrument (*titre au porteur*) within the meaning of art. 1647 C.C.Q. and an endorsed title as provided in art. 2709 C.C.Q. Suffice it, for the moment, to note that the spirit behind arts. 1647 and 2709 C.C.Q. is the same. When a negotiable instrument is handed over, it gives the creditor control of the property.

77 Article 2710 C.C.Q. relates to both hypothecs without delivery and hypothecs with delivery. In the case of a pledge, it must be possible to apply that article without a writing being necessary. I therefore conclude that only the provision concerning assignment of a claim attested by a negotiable instrument is compatible with the rules that apply to pledge.

78 The rules governing the manner in which the pledgee's rights are exercised provide additional, and equally important, clarification. Under art. 2743 C.C.Q., the holder of a hypothec on a claim may collect the capital without being subject to the rules governing the exercise of hypothecary rights (arts. 2748 *et seq.* C.C.Q.). In the case of a pledge, the right to collect the capital, interest and income must be capable of being exercised solely by virtue of holding the instrument.

79 When the instrument is not negotiable, the mere fact that it is held by a third person does not tell the debtor of the hypothecated claim what right would enable the third person, in this case the pledgee, to claim payment from him or her. By virtue of the very nature of the non-negotiable instrument of claim, the rights set out in it are the rights that the grantor may exercise against the debtor of the hypothecated claim. The mere holding of a non-negotiable instrument does not permit the pledgee to exercise his or her rights. The fact that, in those circumstances, the pledgee would be unable to exercise his or her rights clearly shows that the instrument must necessarily incorporate the claim.

80 In short, I find that the pledge of a claim can be granted only by handing over a negotiable instrument. An instrument of that nature is the only thing that allows for the rights inherent in the security to be granted and published, that makes it possible for it to be set up against the debtor, and that allows for the exercise of the rights inherent in the security simply by handing over the instrument. That analysis is not dependent on a choice being made between a broad interpretation and a restrictive one. It is based on the actual concept of pledge, and on a global analysis of the provisions enacted by the legislature when the *Civil Code* was reformed.

81 The appellant placed great stress on the legislature's intention of liberalizing or unifying security interests. On this point, it is worth reviewing the former rules, and the criticisms that prompted the reform, to shed some light on that intention.

E. *The Former Rules*

82 Under the *Civil Code of Lower Canada* ("C.C.L.C."), there were numerous names given to security interests. Placing a thing in the hands of a creditor was called pledge (art. 1966 C.C.L.C.), but the pledging of movable property was called pawning (art. 1968 C.C.L.C.). The C.C.L.C. also provided that debts (*créances*) could be pledged (art. 1974 C.C.L.C.), but pledging was not the only way of granting a security interest in a debt. There was another form of security that enabled a creditor to exercise his or her rights more easily: the C.C.L.C. was interpreted as recognizing that a debt could be assigned by way of security.

83 When the Code was reformed, the legislature did not wish to retain assignments of debts by way of security (L. Payette, "Prior Claims and Hypothecs", in *Reform of the Civil Code* (1993), vol. 4 B, 1, p. 27, and *Act respecting the implementation of the reform of the Civil Code*, S.Q. 1992, c. 57, s. 134). Instead, they were replaced by hypothecs on claims, incorporating certain provisions that apply to assignments of debts, including the mechanism by which they may be set up against third parties set out in art. 1571 C.C.L.C. The mechanism of putting in possession, as regards the creditor and third parties, is, however, the one specifically provided for pledge.

84 Under the C.C.L.C., in order for the assignee to have possession available, there had to be signification of the act of sale and delivery of a copy to the debtor. The assignee could also be put in possession by acceptance by the debtor:

> **1571.** The buyer has no possession available against third persons until signification of the act of sale has been made, and a copy of it delivered to the debtor. He may, however, be put in possession by the acceptance of the transfer by the debtor, subject to the special provisions contained in article 2127.

85 This was a sort of constructive possession, a mechanism that is no longer provided for in the C.C.Q. The only element that was incorporated in art. 1641 C.C.Q. is the possibility of setting up the claim against the debtor and third persons.

86 Under the C.C.L.C., only transfers in writing were recognized (art. 1570 C.C.L.C.). This excluded assignments by way of security that were not set out in a written deed. Article 1571 C.C.L.C. was not intended to cover cases in which the security was granted by simply handing over a title, nor is art. 1641 C.C.Q., the successor to art. 1571 C.C.L.C., intended to cover security for which no writing is required.

87 In short, under the rules in the C.C.L.C., simply handing over deposit certificates would not have been sufficient for it to be possible to set up the pledge against the debtor or third persons. An assignment of claim by way of security would have been permitted, but that form of security is now integrated with hypothecs, and the rules governing hypothecs are the only rules that now prevail.

88 The appellant argues, however, that the spirit of the reform of the law of security calls for a broad interpretation of the categories of titles that may be pledged. It submits that when the Code was reformed, the legislature intended to facilitate access by individuals to credit. The legislature's intention may be found in the commentaries that preceded the reform, and in those made at the time the C.C.Q. was enacted.

F. *The Intention of the Legislature at the Time the Code Was Reformed*

89 It should be noted that the reform of the law of security was initially considered necessary because of the need to modernize some of the mechanisms in commercial matters, which were obviously inadequate. As early as 1956, G. E. Le Dain, then a professor at McGill University, made the following comments in "Security Upon Moveable Property in the Province of Quebec" (1956), 2 *McGill L.J.* 77, at p. 112:

> With respect to [whether the provincial law should provide for a security device which would serve the same purpose as the chattel mortgage does in the other provinces] there seems no good reason why the law should be amended to permit lenders in the personal loan field to obtain security upon movable property without transfer of possession. . . .
>
> The commercial borrower presents quite a different case. Here the law could be more helpful than it is. . .. There would not seem to be any reason, either, why lenders other than the banks should not be able to obtain security without transfer of possession on the inventory of manufacturers. . . .

90 As well, it was Professor Cuming's opinion that the urgent need for tools to facilitate access by businesses to credit without transfer of possession was a major factor in the reform undertaken in Quebec: R. C. C. Cuming, "Article 9 North of 49°: The Canadian PPS Acts and the Quebec Civil Code" (1996), 29 *Loy. L.A. L. Rev.* 971, at p. 973:

> The situation in Quebec, while not fundamentally different in result from the rest of Canada, was in greater need of conceptual reform because of . . . the urgent need for security devices to facilitate nonpossessory business asset financing.

91 Prior to the reform, the law of movable security in Quebec was based not only on privileges, pledge and various mechanisms for retaining an ownership interest, as set out in the C.C.L.C., but also on specific statutes. Thus Quebec law recognized hypothecs and cession and transfer as provided in the *Special Corporate Powers Act*, R.S.Q. 1977, c. P-16, ss. 27 to 32, transfers of property in stock as provided in the *Act respecting the transfer of property in stock*, S.Q. 1982, c. 55, and privileges created by various other statutes.

92 The reform of the *Civil Code* began with the enactment of the *Act respecting the revision of the Civil Code*, S.Q. 1955, c. 47, nearly 50 years ago. Members of the legal profession in Quebec who specialized in commercial law had long regarded the American and Canadian models as a source of inspiration for Quebec: Y. Caron, "L'article 9 du code uniforme de commerce peut-il être exporté? Point de vue d'un juriste québécois", in J. S. Ziegel and W. F. Foster, eds., *Aspects of Comparative Commercial Law: Sales, Consumer Credit, and Secured Transactions* (1969), at p. 374. The American model was based on the concept of a single security interest, which applied to any transaction that created a right in a property to guarantee the performance of an obligation. Its scope is very broad. Its rules are set out in s. 9 of the *Uniform Commercial Code* (1999 rev.) ("UCC"), which has been adopted in most American states; the first official version dates from 1951: J. J. White and R. S. Summers, *Handbook of the Law under the Uniform Commercial Code* (2nd ed. 1980), at pp. 1-6; W. A. Schnader, "A Short History of the Preparation and Enactment of the Uniform Commercial Code" (1967), 22 *U. Miami L. Rev.* 1, at p. 8. In Canada, all of the common law provinces now have personal property security legislation based on the same concept. Given the context, which was a North American one, and the somewhat ill-assorted arrangements described earlier, a set of rules based on a single security interest may have been attractive to the legal profession in Quebec.

93 When the first reform proposal was introduced in Quebec, in 1977, the drafters chose to preserve the fundamental principle of equality among creditors; however, like their Canadian and American neighbours, they were motivated by a concern for harmony and uniformity. They brought together most security interests under the rubric of "hypothec". There was no restriction placed on individuals with respect to movable hypothecs (Civil Code Revision Office, *Report on the Quebec Civil Code* (1978), vol. I, *Draft Civil Code*, arts. 290 *et seq.*). The wording of that initial proposal for reform prompted comments and cautionary observations: R. A. Macdonald, "Modernization of Personal Property Security Law: A Quebec Perspective" (1985), 10 *Can. Bus. L.J.* 182.

94 More than ten years went by before a bill was introduced in the National Assembly. It

preserved the principle of equality among creditors. Although hypothec now encompassed most security interests, a little room was made for a few other forms of prior claim (arts. 2650 to 2659 C.C.Q.). The first version of the bill (Bill 125, *Journal des débats*, 1st Sess., 34th Leg., December 18, 1990, No. 97, at pp. 6568-69) preserved the right of individuals to hypothecate their movable property with or without delivery. However, when the bill was examined by the Subcommittee on Institutions, pressure was brought to bear by consumer groups. The result was that hypothecs without delivery were limited, unless otherwise provided, to commercial property. The comments made at that time provide a clear picture of the concerns felt by those opposed to liberalizing consumer hypothecs (Bill 125, *Journal des débats*, 1st Sess., 34th Leg., December 12, 1991, No. 35, at p. SCI-1412):

> [TRANSLATION] Mr. Chairperson, obviously I am in favour of the sub-amendment because we have never hidden the fact that we were against movable hypothecs for natural persons and we were in perfect agreement with movable hypothecs for businesses. I would remind the committee that this opposition to movable hypothecs for natural persons stems mainly from the fact that, in our view, the Civil Code should reflect the needs, the problems that exist in society, and that we are certainly not persuaded that there is any problem with credit. We believe the opposite to be true, that in Quebec society at present, people are over-indebted and thus have no problem going and getting credit, which is what movable hypothecs for natural persons would allow them to do. So in our view, there has been no demand for movable hypothecs made by any representative groups. This is not a crying need in our society at present. . . . [Emphasis added.]

Those comments came in response to a presentation by the then Minister of Justice, Gil Rémillard, in response to a request by the Opposition representative (*Journal des débats*, *supra*, at p. SCI-1407):

> [TRANSLATION] **Ms. Harel**: I would still like to be certain that there is no grey area. We agree that when we say there is a movable hypothec without delivery, we are not defining what forms the basis of it, we are not in fact saying that there is a hypothec for consumers, we are saying that it is an open question. And this is in a statute that we are saying that. Is that how we understand it?
>
> **Mr. Rémillard**: What we are saying, as regards the consumer aspect, it may be in a statute, we will establish the terms by which it operates. Is that it?
>
> **Ms. Harel**: We will establish the terms by which movable hypothecs without delivery operate.

**Mr. Rémillard**: That's right.

**A voice**: For individuals.

**Mr. Rémillard**: For individuals.

95 The effect of the amendment was to substantially limit individuals' access to hypothecs. For individuals' personal credit, apart from the exception set out in art. 2683 C.C.Q., they are limited to hypothecs with delivery. That form of hypothec is governed by its own rules. The fact that the amendment was made right at the end of the process, nearly a year after the legislative examination of the bill began, and six days before final adoption by the National Assembly, provides a better understanding of why certain hypothecs are better understood in the context of hypothecs without delivery, that is, attested in writing and subject to the requirement of registration. That is the case for hypothecs of a share in a partnership (art. 2211 C.C.Q.) and on the cash value of a life insurance policy (art. 2461 C.C.Q.). As well, art. 2461, para. 2 C.C.Q. even deals with more than one assignment, a case that is incompatible with pledge, but completely consistent with hypothecs without delivery. The *Commentaires du ministre de la Justice* (1993), vol. II, in relation to art. 2461 C.C.Q. make it clear that pledge, as provided in the C.C.L.C., has been replaced by the new provisions concerning hypothecs. He therefore ruled out any possibility of referring to the former law.

96 As Professor R. A. Macdonald noted, "The Counter-Reformation of Secured Transactions Law in Quebec" (1991), 19 *Can. Bus. L.J.* 239, at p. 262, footnote 41, the 1866 legislature had made social policy choices when it created the rules governing security interests. It is apparent that when the Code was reformed in 1991 it modernized the mechanisms for obtaining credit. However, it also made important social policy choices. I would quote Professor Macdonald again (at p. 290):

> While some of these choices may be contested by those who have a commitment to unchecked hedonism, they impose no transaction or administration costs on the general scheme of consensual security, and show how substantive public policy choices can be built directly into an internally efficient and modernized secured transactions regime. [Emphasis added.]

97 The rule set out in art. 2683 C.C.Q. expresses a clear legislative policy choice. Neither the comments made in the literature prior to the reform nor the provisions ultimately enacted seem to support the assertion that the scope of movable hypothecs with delivery should be broadened.

98 The comments made by the Minister of Justice, Serge Ménard, in 1998, when the regulations concerning hypothecs without delivery were made, reflect adherence to that philosophy. At that time, the Minister, who was attempting to allay the fears of consumer protection organizations, expressed the opinion that it would be premature for the government to include RRSPs in the property that may be hypothecated: *Index du Journal des débats — Participants*, 35th Leg., 2nd Sess., *Commission permanente des institutions*, March 19, 1998, Issue No. 110, at pp. 1-17.

99 Given this background, I cannot conclude that the legislature intended to make access to hypothecs, with or without delivery, more readily available to consumers. It is clear that access to credit was indirectly facilitated by modernizing the institutions, but it was not facilitated directly by expanding the concept of pledge.

100 The appellant cites *Perron-Malenfant v. Malenfant (Trustee of)*, [1999] 3 S.C.R. 375, in support of a broad interpretation of the word "title". That case involved the vesting of rights under a life insurance policy in the trustee in bankruptcy. The Court examined the reform of insurance law in Quebec, which was part of the general revision of the *Civil Code*. Gonthier J., who wrote the unanimous opinion of the Court, reaffirmed that the objective at that time was to protect the consumer (at para. 44):

> These [themes] include consumer protection, the protection of the family unit, and the modernization of real security mechanisms over moveable property, giving a broader segment of society access to collateralized credit.

101 That case did not examine the law of security interests. While expanding access to credit might have been intended in 1978, when the first proposal for reform was debated, no such assertion can be made in respect of the requirements for granting hypothecs that were adopted in 1991. I further note that the document referred to in that judgment (Civil Code Revision Office, *supra*, at p. xxxi) was published in 1978, at the time of the first bill, and not when the *Civil Code* was enacted, that is, after it was amended in committee.

102 I noted at the beginning of my analysis that one legal author has argued that a non-negotiable instrument could be pledged. His arguments did not serve as a basis for the Superior Court's judgment, which found that the certificates were negotiable instruments. Nor did they persuade the Court of Appeal judges.

103 Gonthier J., whose opinion I have read, acknowledges (at paras. 1, 14 and 15) that mere handing over of a non-negotiable instrument is not sufficient to grant a pledge. He recognizes it,

however, when, as in this case, the hypothec is attested by a deed that is brought to the attention of the debtor of the claim or is accepted.

104 The conceptual difficulty that makes that approach unacceptable is that the C.C.Q. does not require a writing. The solution adopted adds the requirement of a writing to the method of granting a pledge provided in the C.C.Q. If that approach were taken, a pledge of a non-negotiable instrument would have to be attested by a writing, when art. 2696 C.C.Q. contains that requirement only for a hypothec without delivery.

105 In fact, the legal basis of the analysis presented by Gonthier J. corresponds to an assignment of claim under the C.C.L.C. By that analysis, there is constructive delivery, and it may even take place where there is no instrument (para. 16) when the assignment is accepted or where a copy of the deed of assignment is given to the debtor. That is the solution adopted by the C.C.L.C., and in French law. It is not what the Quebec legislature adopted in 1991. Article 2702 C.C.Q. may present a problem in terms of the interpretation of the word "title", but it is clear that a title must actually be handed over in order for the pledge to be granted. Handing over is a concrete act and not a virtual transaction. Any solution that omits the requirement for a title is therefore, quite simply, contrary to the fundamental concept adopted by the C.C.Q.

106 It would have been surprising, moreover, for the legislature to have wished to allow to co-exist the hypothec without delivery, incorporated in a writing and subject to registration, and the hypothec with delivery, also incorporated in a writing but not subject to registration. This result seems to me to be contrary to the logic behind the establishment of the register of real and personal rights. Exclusion of registration makes sense only for cases where registration adds nothing to publicity and the protection of third persons (see, on the logic of the consequences of registration for the common law provinces, the article by Professor C. Walsh "Registration, Constructive Notice, and the Rule in *Dearle v. Hall* — Judicial Reform in Nova Scotia: *Martin v. Shubenacadie*" (1997), 12 *B.F.L.R.* 129, at pp. 135-51).

107 Contrary to the interpretation of my analysis offered by Gonthier J., I do not claim that the "existence" of the writing is inconsistent with the concept of pledge. Rather, it is the requirement for a writing that is inconsistent. In fact, the conclusions he draws in this case are based on an analysis of the rights that derive from the deed of hypothec granted to the Caisse, and not on an analysis of the rights that would result from merely handing over the certificates.

108 From a theoretical perspective, it is even more impossible for me to accept the approach taken by Gonthier J. in that it confuses the granting (art. 2702 C.C.Q.) of a pledge with whether or not it may be set up against the debtor of the claim (art. 2710 C.C.Q.). If we were to take the approach he

proposes (at para. 15), handing over would not be complete until the formality in art. 1641 C.C.Q. had been performed. This is contrary to art. 2702 C.C.Q., which provides that granting of the pledge is complete by delivery (*remise*) alone. According to arts. 2710 and 1641 C.C.Q., the hypothec may be set up against the debtor once it has been granted. If that interpretation is applied to a hypothec without delivery, the difficulty that is inherent in the confusion of these steps is even more apparent. For a hypothec of that nature, the creditor may wish to grant the hypothec and delay the point at which it may be set up against the debtor. The two steps may neither be reversed nor confused.

109 In addition, the grammatical analysis of art. 2709 C.C.Q. conducted by my colleague does not stand up to scrutiny. In order to reflect more clearly the rule provided for in the article, the elements of the sentence may be moved to read: "Where the title is negotiable by endorsement and delivery, its remittance to the creditor takes place by endorsement and delivery, or where the title is negotiable by delivery alone, its remittance takes place by delivery alone". When that article is interpreted within the overall context of the provisions concerning pledge, it can be relied on only to exclude non-negotiable titles. In fact, it would have been surprising if the legislature had specified the method of negotiation in a clear case, the case of a negotiable title, and then in a problematic case, the case of a non-negotiable title, had made no provision for the method of negotiation.

110 Moreover, while he refers to art. 1971, para. 2 C.C.L.C., which deals with pledge, Gonthier J. writes that one of the criticisms of assignment of claims as security under the C.C.L.C. was that it allowed the creditor to include a giving in payment clause, a situation that is completely different under the C.C.Q. (para. 27). Regardless of what reasons might have motivated the changes in respect of pledge, a creditor may, under art. 2743 C.C.Q., collect the capital without having to comply with the general provisions governing the exercise of hypothecary rights (arts. 2748 *et seq.* C.C.Q.). A hypothec on claims, with or without delivery, is separate, in this regard, from the general rules governing security interests.

111 Gonthier J. finds support for his analysis in the French, German, Swiss and Canadian rules in this matter. However, all those rules require a writing as a prerequisite for granting a pledge of an instrument like the one that concerns us here: see, in particular, P. Simler and P. Delebecque, *Droit civil: Les sûretés — La publicité foncière* (2nd ed. 1995), No. 537, at pp. 440-41, and art. 900 of the Swiss Civil Code: [TRANSLATION] "Claims which are not incorporated in an instrument or result only from a recognition of debt are pledged in writing and in addition, in the latter case, by handing over the instrument."

112 I myself therefore conclude that, in Quebec, there has been a separate legislative policy choice. Unlike all of the systems that do require a writing, the C.C.Q. does not contain such a requirement.

113 It is worth noting that the statutory rules in the common law provinces, which were said to have influenced the reform of the law of security interests, would not acknowledge that a pledge may be granted by handing over documents such as the deposit certificates in issue here. Those certificates cannot be characterized as "instruments" within the meaning of those statutes: see, for example, ss. 1 and 2 of the Ontario *Personal Property Security Act*, R.S.O. 1990, c. P.10.

114 Rather, a comparison with the 1999 amendment to the UCC militates in favour of the interpretation I am suggesting. The version of the UCC that provided the model for the legal professionals who were involved in the reform would not have recognized the transaction that concerns us as a pledge. Bank accounts now fall under the UCC as the result of the recent amendment, which also added a new method of perfection, "control": J. J. White and R. S. Summers, *Uniform Commercial Code* (4th ed. 2000), at pp. 80 and 98. First, the C.C.Q. has not been amended: we still have only handing over. Second, when the question was put to the National Assembly, that approach was rejected.

115 Given this background, I cannot bring myself to agree that in 1991, the legislature intended to extend hypothecs on claims to situations in which a pledge could not have been granted, under the C.C.L.C., simply by handing over the title. The legislature has made an effort to modernize and bring uniformity to security interests, but it has not sought to widen the cases in which mere handing over was sufficient to grant a pledge.

116 No matter how attractive the approach proposed by Gonthier J. may be, I cannot bring myself to agree with it. In my opinion, that would mean adding to the enactment and substituting for it an idea of what it should be, when a clear choice was made by the legislature in 1991. In my view this would be judge-made law.

III. Conclusion

117 While, as a general rule, the civil law calls for a careful analysis of the wording, it also requires a clear understanding of its fundamental concepts and the relationships among its institutions. The parameters of the security interest that pledge constitutes cannot be completely grasped from a literal analysis of the provisions governing it. Nor can the problem submitted by the parties be solved by that kind of analysis. We must therefore look to the objective of delivery, which is to give the creditor control of the property. We must also, in a case in which the pledge is of a claim, harmonize the provisions governing pledge with those concerning hypothecs on claims.

118 Given this background, delivery cannot be accomplished by handing over documents such

as the deposit certificates in issue here. Apart from the difficulties inherent in the tax constraints, the Caisse does not really have control of the security interest simply by holding the deposit certificates. The certificates set out the rights of Desjardins Trust and of the annuitants, but the Caisse does not, merely by holding them, acquire any right that would allow it to collect the capital at maturity without performing any formality.

119 The word "title" in art. 2702 C.C.Q. cannot be interpreted out of context. The concept of pledge cannot apply to a document when possession of that document does not, in itself, confer any right. In addition, the legislative history shows that the pledge of a claim must give the pledgee possession such that it is able to collect the claim. The Caisse therefore does not hold a valid hypothec, given that it does not hold a title that gives it that right.

120 The *Civil Code of Quebec* does not define a negotiable instrument, as the *Bills of Exchange Act* does. It does not prohibit the parties from expressly agreeing that an instrument will be negotiable. In this case, they did not do so. The Caisse can therefore not set up a validly granted security interest against the trustee.

121 For these reasons, I would dismiss the appeal with costs.

## APPENDIX

*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)

**104.** (1) In this Act, a reference to a trust or estate (in this subdivision referred to as a "trust") shall be read as a reference to the trustee or the executor, administrator, heir or other legal representative having ownership or control of the trust property.

**146.** (1) In this section,

"retirement savings plan" means

(*a*) a contract between an individual and a person licensed or otherwise authorized under the laws of Canada or a province to carry on in Canada an annuities business, under which, in consideration of payment by the individual or the individual's spouse of any periodic or other amount as consideration under the contract, a retirement income commencing at maturity is to be provided for the individual, or

(*b*) an arrangement under which payment is made by an individual or the individual's spouse

(i) in trust to a corporation licensed or otherwise authorized under the laws of Canada or a province to carry on in Canada the business of offering to the public its services as trustee, of any periodic or other amount as a contribution under the trust,

(ii) to a corporation approved by the Governor in Council for the purposes of this section that is licensed or otherwise authorized under the laws of Canada or a province to issue investment contracts providing for the payment to or to the credit of the holder thereof of a fixed or determinable amount at maturity, of any periodic or other amount as a contribution under such a contract between the individual and that corporation, or

(iii) as a deposit with a branch or office, in Canada, of

(A) a person who is, or is eligible to become, a member of the Canadian Payments Association, or

(B) a credit union that is a shareholder or member of a body corporate referred to as a "central" for the purposes of the *Canadian Payments Association Act*,

. . .

to be used, invested or otherwise applied by that corporation or that depositary, as the case may be, for the purpose of providing for the individual, commencing at maturity, a retirement income;

. . .

(2) The Minister shall not accept for registration for the purposes of this Act any retirement savings plan unless, in the Minister's opinion, it complies with the following conditions:

(*a*) the plan does not provide for the payment of any benefit before maturity except

(i) a refund of premiums, and

(ii) a payment to the annuitant;

(*b*) the plan does not provide for the payment of any benefit after maturity except

(i) by way of retirement income to the annuitant,

(ii) to the annuitant in full or partial commutation of retirement income under the plan, and

(iii) in respect of a commutation referred to in paragraph (*c*.2);

(*b*.1) the plan does not provide for a payment to the annuitant of a retirement income except by way of equal annual or more frequent periodic payments until such time as there is a payment in full or partial commutation of the retirement income and, where that commutation is partial, equal annual or more frequent periodic payments thereafter;

(*b*.2) the plan does not provide for periodic payments in a year under an annuity after the death of the first annuitant, the total of which exceeds the total of the payments under the annuity in a year before that death;

(*b*.3) the plan does not provide for the payment of any premium after maturity;

(*b*.4) the plan does not provide for maturity after the end of the year in which the annuitant attains 69 years of age;

(*c*) the plan provides that retirement income under the plan may not be assigned in whole or in part;

(*c*.1) notwithstanding paragraph (*a*), the plan permits the payment of an amount to a taxpayer where the amount is paid to reduce the amount of tax otherwise payable under Part X.1 by the taxpayer;

(*c*.2) the plan requires the commutation of each annuity payable thereunder that would otherwise become payable to a person other than an annuitant under the plan;

(*c*.3) the plan, where it involves a depositary, includes provisions stipulating that

(i) the depositary has no right of offset as regards the property held under the plan in connection with any debt or obligation owing to the depositary, and

(ii) the property held under the plan cannot be pledged, assigned or in any way alienated as security for a loan or for any purpose other than that of providing for the annuitant, commencing at maturity, a retirement income;

(*c*.4) the plan requires that no advantage, other than

(i) a benefit,

(i.1) an amount described in paragraph (*a*) or (*c*) of the definition "benefit" in subsection (1),

(ii) the payment or allocation of any amount to the plan by the issuer,

(iii) an advantage from life insurance in effect on December 31, 1981, or

(iv) an advantage derived from the provision of administrative or investment services in respect of the plan,

that is conditional in any way on the existence of the plan may be extended to the annuitant or to a person with whom the annuitant was not dealing at arm's length; and

(*d*) the plan in all other respects complies with regulations of the Governor in Council made on the recommendation of the Minister of Finance.

. . .

(7) Where in a taxation year a loan, for which a trust governed by a registered retirement savings plan has used or permitted to be used trust property as security, ceases to be extant, and the fair market value of the property so used was included by virtue of subsection (10) in computing the income of the taxpayer who is the annuitant under the plan, there may be deducted, in computing the income of the taxpayer for the taxation year, an amount equal to the amount, if any, remaining when

(*a*) the net loss (exclusive of payments by the trust as or on account of interest) sustained by the trust in consequence of its using the property, or permitting it to be used, as security for the loan and not as a result of a change in the fair market value of the property

is deducted from

(*b*) the amount so included in computing the income of the taxpayer in consequence of the trust's using the property, or permitting it to be used, as security for the loan.

. . .

(10) Where at any time in a taxation year a trust governed by a registered retirement savings plan

(*a*) acquires a non-qualified investment, or

(*b*) uses or permits to be used any property of the trust as security for a loan,

the fair market value of

(*c*) the non-qualified investment at the time it was acquired by the trust, or

(*d*) the property used as security at the time it commenced to be so used,

as the case may be, shall be included in computing the income for the year of the taxpayer who is the annuitant under the plan at that time.

. . .

(12) Where, on any day after a retirement savings plan has been accepted by the

Minister for registration for the purposes of this Act, the plan is revised or amended or a new plan is substituted for it, and the plan as revised or amended or the new plan, as the case may be (in this subsection referred to as the "amended plan"), does not comply with the requirements of this section for its acceptance by the Minister for registration for the purposes of this Act, subject to subsection (13.1), the following rules apply:

(*a*) the amended plan shall be deemed, for the purposes of this Act, not to be a registered retirement savings plan; and

(*b*) the taxpayer who was the annuitant under the plan before it became an amended plan shall, in computing the taxpayer's income for the taxation year that includes that day, include as income received at that time an amount equal to the fair market value of all the property of the plan immediately before that time.

(13) For the purposes of subsection (12), an arrangement under which a right or obligation under a retirement savings plan is released or extinguished either wholly or in part and either in exchange or substitution for any right or obligation, or otherwise (other than an arrangement the sole object and legal effect of which is to revise or amend the plan) or under which payment of any amount by way of loan or otherwise is made on the security of a right under a retirement savings plan, shall be deemed to be a new plan substituted for that retirement savings plan.

*Appeal allowed with costs,* BINNIE, LEBEL *and* DESCHAMPS JJ. *dissenting.*

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